

Supreme Court of the United States

No. 707. October Term, 1941.

LEWIS J. VALENTINE, individually and as
Police Commissioner of The City of
New York,

Petitioner,

against

F. J. CHRESTENSEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

February 26, 1942.

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BRIEF FOR PETITIONER

A writ of certiorari was granted by this Court on November 24, 1941, to review a final decree (R., 51-52) of the United States Circuit Court of Appeals for the Second Circuit, affirming (FRANK, Cir. J., dissenting) a final decree (R., 9-10) made by the United States District Court for the Southern District of New York (HULBERT, J.), which (so far as relevant) adjudged "that Section 318 of the Sanitary Code of the City of New York . . . insofar as it prohibits the distribution of handbills containing commercial or business advertising matter upon . . . streets, sidewalks and public places of New York City . . . is unconstitutional and invalid as applied to the distribution" by respondent of the handbill involved in this suit, and which perpetually enjoined the Police Department from interfering with the distribution of such handbill upon the streets and other public places of the City.

The Proceedings Below.

Respondent instituted suit in the United States District Court for the Southern District of New York to enjoin petitioner from interfering with the distribution of his

handbill (Pltf. Exh. A; R., 18A-18B) on the streets and other public places in the City of New York. Jurisdiction was alleged to exist under § 24(1) of the Judicial Code (28 U. S. C. § 41[1]), the amount involved assertedly being in excess of \$3,000, and also under § 24(14) of the Judicial Code (28 U. S. C. § 41[14]), upon the alleged deprivation of constitutional rights. The District Court granted respondent's motion for an injunction *pendente lite*, holding § 318 of the Sanitary Code invalid on its face. After a trial at which the facts were stipulated (R., 15-18), the District Court entered a final decree granting a permanent injunction (R., 9-10)*. The opinion of the District Court is reported in 34 F. Supp. 596, and reprinted as an Appendix, *post*, p. 39.

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court, 122 F. (2d) 511. CLARK, Cir. J. (with whom SWAN, Cir. J., concurred), wrote the prevailing opinion; FRANK, Cir. J., wrote a dissenting opinion. The order of affirmance (R., 51-52) was filed August 14, 1941.

Jurisdiction.

The order of the United States Circuit Court of Appeals for the Second Circuit was filed August 19, 1941. The jurisdiction of this Court is based on U. S. Code, tit. 28, § 347, subd. (a). The petition was filed in this Court on October 21, 1941, and was granted November 24, 1941.

Summary Statement of the Case.

Respondent sought to distribute on the streets of New York City a handbill advertising a purely commercial ven-

* A further contention by respondent which involved the constitutionality of a City park regulation (New York City Park Department Regulations, Art. II, § 6, R., 4) was decided adversely to him in the District Court (R., 10), but respondent took no appeal.

ture. The Police Commissioner informed him that such distribution was forbidden under § 218 of the Sanitary Code, which prohibits only the street distribution of commercial handbills. Thereupon respondent printed upon the back of the handbill a protest against the acts of a certain public official, and sought to distribute this doublefaced handbill upon the public streets.

The Police Commissioner objected, and the present suit was brought to restrain him. The courts below held that interference with the street distribution of this handbill violated the First and Fourteenth Amendments to the Constitution of the United States.

Thus, two questions, never before passed upon by this Court, are presented: first, whether a municipality may constitutionally prohibit the street distribution of commercial advertising; and secondly, whether such a prohibition, if valid, may be evaded by the device of adding to a purely commercial handbill, a gratuitous attack upon a public official.

The Facts.

The material facts were stipulated at the trial (R., 15-18). As stipulated, they were found by the District Court (R., 8).

Respondent, F. J. Chrestensen, owns, and exhibits for profit, the former United States Navy Submarine S-49. When he brought his submarine to New York City in the late Spring of 1940, he sought permission from the City Dock Commissioner to exhibit it at a City-owned pier. This permission was denied him in accordance with an established City policy not to permit the use of city-owned docks for purposes of commercial exploitation un-related to navigation. He thereupon obtained the use of a nearby state-owned pier, Pier 5 on the East River, New York City. In the latter part of June, 1940, while the S-49 was on exhibi-

tion at that pier, Chrestensen prepared and printed a handbill to advertise the submarine, describing its attractions and soliciting public patronage at a stated admission price (R., 18C). This handbill is hereinafter referred to as "handbill No. 1".

When Chrestensen attempted to have handbill No. 1 distributed on the public streets of the City, he was advised by petitioner, the Police Commissioner, that this would violate §318 of the Sanitary Code, which prohibits such distribution of "commercial and business advertising matter". He was further advised, however, that he was free to distribute handbills devoted solely to "information or a public protest" (R., 17).

Thereupon Chrestensen prepared and exhibited to the Police Commissioner in proof form, a double-faced handbill (Pltf. Exh. A; R., 18A-18B). Its face was a revision of handbill No. 1, and it is stipulated that it contains nothing but commercial advertising matter (R., 17). Its reverse side, it is stipulated, consists of a protest against the conduct of the City Dock Department in denying him wharfage facilities for the exhibition of the submarine, and is devoid of advertising matter (*ibid.*). This second handbill is hereinafter referred to as "handbill A". When Chrestensen submitted the printer's proof of handbill A to the Police Department, he was advised that a handbill consisting solely of the protest matter printed on its reverse side could be distributed without violating §318 of the Sanitary Code and without restraint but that the double-faced handbill could not (R., 17-18). He nevertheless went forward with his plans, had handbill A printed up as a single document and as a result was restrained from distributing it by the police authorities (*ibid.*). This suit was then brought to enjoin the Police Commissioner from interfering with its distribution (R., 18).

Three facts deserve special mention. First, Chrestensen's sole purpose in distributing a handbill was clearly to increase the profits of his business enterprise; he alleges, and it has been stipulated, that the action of the police authorities had diminished his net profits by more than \$3,000 (R., 18). Second, Chrestensen made no attempt to prepare or distribute a protest against the Dock Commissioner until *after* he had been advised that he could not distribute a straight commercial handbill such as handbill No. 1. Third, Chrestensen *at no time* sought to distribute a straight protest handbill even though he had been specifically advised by the police authorities that he had a right to do so.

Thus it is apparent that the addition of the protest was a mere subterfuge, added for the sole purpose of evading the prohibition against the distribution of commercial advertising on the city streets contained in § 318 of the Sanitary Code. Had Chrestensen had any bona fide interest in the distribution of his protest, he could have followed the advice of the police and had it printed on a separate sheet of paper, at practically no added expense.

The Regulation Involved.

Section 318 of the Sanitary Code of New York City (Health Department Regulations, Art. III, § 318) provides:

"Handbills, cards and circulars.—No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. *This section*

is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter." (Italics ours.)

The first sentence of this enactment is derived from a series of ordinances framed in almost identical language which were in effect for at least thirty years prior to 1938. The ordinance was then transmuted into the present Health Department regulation, at which time the last sentence was added.

The Issues.

Section 318 of the Sanitary Code expressly declares that it applies only to "commercial and business advertising matter". The Courts of New York have consistently held that this regulation applies only to those advertisements which are intended to attract the attention and patronage of the public to enterprises entered into for pecuniary gain. Well before the decisions in *Lovell v. Griffin*, 303 U. S. 444 (1938) and *Schneider v. State*, 308 U. S. 147 (1939), the New York Courts held that § 318 and its predecessor did not apply (1) to *non-commercial advertisements* (i. e., advertisements of meetings held in furtherance of some political, social, economic or other movement, irrespective of whether an admission is charged therefor), or (2) to *non-commercial literature* (i. e., written matter calculated to communicate information or opinions on matters of public concern). Accordingly, there is squarely presented the question of whether a regulation that is narrowly limited to *commercial advertisements* is constitutional; and the further question of whether, if such a regulation is constitutional, it may be evaded by the device of adding to the back of a purely commercial handbill, a gratuitous protest against the action of a public official.

This Court has never passed upon the question of whether the street distribution of *commercial advertise-*

ments may be prohibited. To date the Court has merely held that the street distribution of non-commercial advertisements (such as an advertisement of a political meeting, even though admission was charged) may not be prohibited. We contend that the street distribution of commercial advertisements is in no way essential to a full and free exchange of information, ideas and opinions on matters of public concern; that the street distribution of commercial advertisements is not protected by the freedom of press that is secured by the First and Fourteenth Amendments to the Constitution; that the prohibition of such street distribution is not a deprivation of property without due process or a denial of the equal protection of the laws; and that the street distribution of such advertisements may therefore be prohibited under the police power.

We further contend that the question of whether a hybrid handbill is or is not a commercial advertisement depends upon the facts and circumstances of a particular case, and that the facts which have been stipulated in the instant case demonstrate that handbill A is unquestionably a commercial advertisement.

The Opinions Below.

There are three opinions in connection with the determination of this controversy, *viz.*, that of the District Court in granting respondent's motion for a preliminary injunction (the only opinion of the District Court), that of the majority of the Circuit Court of Appeals, and that of the dissenting Circuit Judge.

(i)

In its opinion granting respondent's application for an injunction *pendente lite**, the District Court held § 318 of

* This opinion was inadvertently omitted from the record. It is reprinted in Appendix, *post*, p. 39.

the Sanitary Code unconstitutional and invalid on its face, relying primarily upon *Lovell v. Griffin*, 303 U.S. 444 (1938), *Schneider v. State*, 308 U.S. 147 (1939) and *People v. Taylor*, 33 Cal. App. (2d) 760, 85 Pac. (2d) 978 (1938). The Court also held that respondent was deprived of constitutional rights by reason of the discriminatory nature of the ordinance, saying that "The ordinance is clearly discriminatory against the business man while affording protection to persons distributing non-commercial handbills" (Appendix, pp. 47-48). When the final decree was entered, however, the District Court did not go so far. It did not hold § 318 to be entirely invalid. Instead, it made a finding that insofar as § 318 prohibits the distribution of handbills such as respondent's, it abridges the freedom of the press secured by the First and Fourteenth Amendments (R., 8), is discriminatory, and constitutes a deprivation of property without due process (*ibid.*). Thus the Court narrowed its prior holding that the ordinance is invalid on its face to a holding that the ordinance is invalid as applied.

(ii)

In the majority opinion of the Circuit Court of Appeals (R., 21-32); which affirmed the District Court, Judge CLARK interpreted *Schneider v. State*, *supra*, as holding that a municipality could not prohibit the street distribution of commercial handbills. As to this, he said (R., 28):

"We think, therefore, that interpretation of the conclusions of the *Schneider* case is not doubtful. Absolute prohibition of expression 'in the market place' is illegal, not to be saved by any commercial taint attached to the expression; reasonable regulation of soliciting, not preventing freedom of expression, is permissible."

Judge CLARK proceeded to discuss at some length the application to the handbill before him (Pltf. Exh. A; R., 18A-18B) of the distinction that has been drawn by the Legislature and Courts of New York between commercial and non-commercial handbills. On this aspect of the case, he rejected as uncertain and unreal petitioner's argument that the nature of a handbill was to be judged by the circumstances out of which it came to be printed, its purpose and its contents (R., 30-31). In conclusion, he stated the effect and scope of his decision as follows (R., 32):

"To avoid misunderstanding, perhaps we should say that, while absolute prohibition of commercial handbills seems to us of doubtful validity, yet we decide no more here than that at least it cannot extend to a combined protest and advertisement not shown to be a mere subterfuge."

(iii)

Judge FRANK dissented from the entire opinion of the majority (R., 32-51). He concluded that it was apparent from the stipulated facts that respondent's sole purpose in trying to distribute his handbill was commercial, that there was no evidence of mixed motives on respondent's part and that respondent's handbill must be considered a commercial circular (R., 32-42). Judge FRANK also stated that, in his opinion, *Lovell v. Griffen*, *supra*, and *Schneider v. State*, *supra*, were not to be read as overruling earlier decisions of this Court (such as those respecting outdoor advertising and billboards) which are wholly inconsistent with the proposition that commercial advertisements are protected by the right of freedom of the press (R., 46-47). On the contrary, Judge FRANK said, the *Lovell* and *Schneider* cases referred only to "historic weapons in the

defense of liberty" and "restrictions cutting off appropriate means through which, in a free society, the processes of popular rule may effectively function" (R., 47). Going on from there to consider as a question of first impression the City's power to prohibit the distribution of commercial handbills, Judge FRANK concluded that the right to disseminate opinion and information encompassed by the Constitutional guarantee did not extend to commercial advertisements, and that the City's police power validly extended to the adoption and enforcement of a regulation prohibiting the street distribution of commercial handbills such as respondent's (R., 47-51).

Specification of Errors to be Urged

1. We contend that the Circuit Court of Appeals erred in holding that handbill A is not a commercial advertisement* and is not a subterfuge devised in an effort to evade § 318 of the Sanitary Code.

2. We further contend that the Circuit Court of Appeals erred in refusing to hold that the City of New York in the exercise of its police power may prohibit the street distribution of commercial advertisements without violat-

* It should be kept in mind that the term "commercial advertisement", as used in this brief, excludes all such advertisements as those which relate to books or circulars of a political, religious or social nature, or those which relate to public meetings devoted to subjects of general interest at which an admission may be charged. In short, the term "commercial advertisement" is here restricted to include only those advertisements which are circulated for purposes of private gain in connection with a purely commercial enterprise such as the exhibition for profit of a privately owned submarine.

ing the right of freedom of the press that is secured by the First and Fourteenth Amendments to the Constitution of the United States, and without violating the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

3. We contend that the Circuit Court of Appeals erred in refusing to hold that § 318 of the Sanitary Code is constitutional and valid both on its face and as applied to handbills such as handbill A.

Argument.

Upon the record as outlined above, we shall argue as follows:

1. A municipality may, in the exercise of the police power, prohibit the distribution of commercial advertising in streets and other public places. A municipal regulation prohibiting such distribution does not abridge the freedom of the press secured by the First and Fourteenth Amendments to the Constitution of the United States and does not entail a deprivation of property without due process or denial of the equal protection of the laws within the contemplation of the Fourteenth Amendment to the Constitution of the United States.

2. Section 318 of the Sanitary Code prohibits only the street distribution of commercial and business advertising matter, and is therefore constitutional.

3. A valid prohibition against the street distribution of commercial advertising may not be evaded by the device of adding to a purely commercial handbill a gratuitous protest against the acts of public officials such as that involved in this case.

POINT. I.

A municipality may, in the exercise of the police power, prohibit the distribution of commercial advertising in streets and other public places. A municipal regulation prohibiting such distribution does not abridge the freedom of the press secured by the First and Fourteenth Amendments to the Constitution of the United States and does not entail a deprivation of property without due process or a denial of the equal protection of the laws within the contemplation of the Fourteenth Amendment to the Constitution of the United States.

The first question in this controversy is whether a valid distinction can be made between a regulation which prohibits the street distribution of commercial advertising and a regulation which prohibits the distribution of non-commercial or protest literature. If there be no such distinction in law, it is futile to discuss the scope of § 318 of the Sanitary Code or the nature of handbill A. We therefore propose to show at the outset that a municipality may lawfully prohibit the street distribution of commercial advertisements without violating any constitutional rights.

- 1. The distinction between commercial advertisements and protest or opinion literature in respect of constitutional guarantees is inherent in the decisions of this Court.**

The decisions of this Court touching upon the printed word have sharply distinguished between commercial advertisements on the one hand and protest or opinion literature on the other. Enactments prohibiting outdoor street advertising and billboard advertising have been sustained by this

Court without even a mention of freedom of the press. *Fifth Avenue Coach Company v. City of New York*, 221 U. S. 467 (1911); *Packer Corporation v. Utah*, 285 U. S. 105 (1932). So, too, second class mailing privileges, which are accorded only to newspapers and periodicals and expressly denied to commercial advertisements, have received unstinted approval. *Lewis Publishing Company v. Morgan*, 229 U. S. 288, 313-316 (1912); 39 U. S. C. § 226.* Similar discrimination against commercial advertisements has frequently been adopted in tariff regulations. *Van Doorn v. U. S.*, 12 Court of Customs Appeals 167 (1924). Also, while the display of a flag for the purpose of expressing a political opinion cannot be constitutionally prohibited, *Stromberg v. California*, 283 U. S. 359, 369 (1931), the display of the flag for which this Court has called "mere advertising" purposes can be and is so prohibited. *Halter v. Nebraska*, 205 U. S. 34 (1907):

Finally, while the decision of this Court in *Mutual Film Corporation v. Industrial Commission of Ohio*, 236 U. S. 230 (1915), which upheld the right of a State to censor motion pictures prior to exhibition, must be read against the background of its historical setting,† the language of

* It is clear that withholding second class privileges from a newspaper or periodical constitutes a curtailment of the dissemination of information and opinion on matters of public concern and thus a *de facto* interference with freedom of the press. See, Chafee, *Free Speech in the United States* (1941), pages 98-99, 169, 302 ff. Whether it constitutes a *de jure* abridgment of freedom of the press is apparently still undecided. See, *Ex Parte Jackson*, 96 U. S. 727 (1877); *Public Clearing House v. Coyne*, 194 U. S. 497, 506-508 (1904); *Milwaukee Publishing Company v. Burleson*, 255 U. S. 407, 417 (1921); Chafee, *Free Speech in the United States*, page 20; Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703 (1938).

† See Chafee, *Free Speech in the United States*, pages 294, 544. Not only had this Court not yet held that the protection of the rights secured by the First Amendment extended to encroachment by the States, but, as the author points out, "The Court could not then realize the importance of this new method for communicating facts and ideas to great masses of the public."

the opinion is apposite. This Court there declared (pp. 243-244):

"We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention. * * *. It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that *the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion.*" (Italics ours).

2. **The distinction between commercial advertisements and protest or opinion literature is dictated by the constitutional concept of freedom of the press.**

The distinction between commercial advertisements and opinion or protest literature is based upon the fact that neither the content nor the purpose of commercial advertising matter fits the rationale of the democratic institution of a free press guaranteed by our Constitution. A restriction upon the right to use the public streets for purposes of commercial advertisements in no way impairs that right to a free and full exchange of opinion and information on

matters of public concern which is secured to us by the First and Fourteenth Amendments. To appreciate the truth of this, it is necessary only to consider what is meant by a free press, and why our Constitution insists upon it.

In *Grosjean v. American Press Co., Inc.*, 297 U. S. 233 (1936), this Court had occasion to say (p. 250):

"The predominant purpose of the grant of immunity here invoked was *to preserve an untrammelled press as a vital source of public information*. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; *and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.*" (Italics ours.)

The nature of freedom of the press was cogently stated in *Thornhill v. Alabama*, 310 U. S. 88, 95, 101-102 (1940), where it was said (p. 95):

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. *Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error*

through the processes of popular government."
(Italics ours.)

See also *Carlson v. California*, 310 U. S. 106 (1940); *C. I. O. v. Hague*, 25 F. Supp. 127, 132 ff. (1938), aff'd 307 U. S. 496 (1939); 2 Cooley, *Constitutional Limitations* (8th Ed., 1927) pages 885-886.

Quotations expressing these same considerations could be multiplied endlessly. They lead to but one conclusion,—that these considerations are all completely foreign to the function of commercial advertising in a democratic society. Commercial advertisements do not serve to aid the public in the discovery of "political and economic truth"; they serve only to make known to the public what the advertiser seeks to sell. Their motive is not "public education"; it is by definition always one of personal profit. A restriction upon the distribution of commercial advertising on the public streets undoubtedly increases the cost of selling the advertised product, by compelling the seller to pay for advertising space in the press or on bill-boards; but suppression of opinion and protest must lead eventually to the end of democratic government and institutions for all of us.

3. The recent decisions of this Court in the handbill cases relate only to non-commercial handbills, and distinguish between such handbills and commercial advertising.

Our contention that the unrestricted distribution of commercial advertisements is not essential to maintaining the freedom of the press has been met primarily with the assertion that this Court has ruled otherwise in *Lovell v. Griffin*, 303 U. S. 444 (1938), *Hague v. C. I. O.*, 307 U. S. 496 (1939), and *Schneider v. State*, 308 U. S. 147 (1939).^{*} But to show that the argument involves an unwarranted exten-

^{*} See Appendix, pp. 42-47; and R., 26-28.

sion, if not an actual misreading, of what was held, it is necessary only to examine the questions which were before the Court in those cases.

In the *Lovell* case, this Court held that a municipality could not prohibit the street distribution of religious tracts, setting forth the gospel of the "Kingdom of Jehovah". In the *Rague* case it was held that a municipality could not forbid the street distribution of organizing literature by the Committee of Industrial Organization. The *Schneider* case was really four cases. This Court there held that a municipality could not prohibit the street distribution of (1) notices of a protest meeting in connection with the administration of State unemployment insurance, (2) pamphlets of the Watch Tower Bible and Tract Society, a branch of the religious sect known as Jehovah's Witnesses, (3) strike literature, and (4) handbills advertising a meeting to be held under the auspices of "Friends Lincoln Brigade" to discuss the Spanish Civil War.

Manifestly, none of the pieces of literature involved in the above cases constitutes commercial advertising as we use that term. In each instance a municipality had attempted to prohibit the distribution of handbills dealing with economic, political, social or religious questions upon which information or opinion was being disseminated. The free distribution of such material was clearly protected by the guarantee of freedom of the press. True, since the notices of the meeting with reference to the war in Spain, which were before the Court in the *Schneider* case, showed that a stated admission price was to be charged, that fact led to a characterization of those notices as "commercial advertising" (see 308 U. S., at p. 155, footnote). However, as they were in fact invitations to a meeting which was to be devoted to the expression of views on a political and social question of public concern, they were clearly not commercial

advertisements, in the sense that they were advertising a commercial enterprise operated for profit. On the contrary, they were *non*-commercial advertisements within the concept of freedom of the press, for their suppression would have limited the free discussion of matters of public concern*.

We respectfully submit that the decisions of this Court above cited went no farther than to hold that street distribution of *literature of the kind which was before the Court* could not be prohibited. There is no reason to suppose that this Court, in deciding as it did, intended so to expand the meaning of "freedom of the press" as to overrule and nullify the cases discussed on pages 13-14, *supra*, or to enunciate a new doctrine to the effect that every printed word may be distributed *ad lib* on the city streets. Indeed, in the *Schneider* case, this Court specifically held as an abridgement of the constitutional liberty only the prohibition of such activity as bears a "necessary relationship to the freedom to speak, write, print or distribute *information or opinion*" (308 U. S., at p. 161; italics ours), and went on to say (p. 165):

"We are not to be taken as holding that *commercial* soliciting and canvassing may not be subjected to such regulation as the ordinance requires." (Italics ours.)

Moreover, in *Lovell v. Griffin*, 303 U. S. 444, *supra*, this Court cited with approval *Coughlin v. Sullivan*, 100 N. J. L. 42, 126 Atl. 177 (1924), which emphatically announces a line of distinction between commercial and non-commercial

* With regard to that phase of the *Schneider* decision, it has been said: "An invitation to discussion is more than commercial advertising; it is part of the process of making discussion effective." Chafee, *Free Speech in the United States*, page 404. Thus, the announcement is an essential ingredient of freedom of discussion in the same manner as distribution of a publication is an essential ingredient of freedom of the press. Cf. *Ex Parte Jackson*, *supra*, 96 U. S. 727; *Lovell v. Griffin*, *supra*, 303 U. S., at page 452.

matter. It is cited under a "See also" for the proposition that (303 U. S., at p. 452);

"The press in its historic connotation comprehends *every sort of publication which affords a vehicle of information and opinion*. What we have had recent occasion to say with respect to the vital importance of protecting this essential liberty from *every sort of infringement* need not be repeated." (Italics ours.)

Yet the New Jersey Court had said, in distinguishing between commercial and non-commercial matter (100 N. J. L., at p. 43):

"It is a matter of common knowledge, of which the court will take judicial notice, that certain circulars, pamphlets, etc., especially such as advertise commercial or business enterprises, when indiscriminately distributed to pedestrians, having no desire or use for them, are cast away so as to litter the streets. The natural and ordinary result of the distribution of such circulars being to litter the streets, an ordinance prohibiting their distribution is adapted to, and reasonably necessary to prevent, such evil. The principle is elucidated in *Harwood v. Trembley*, 97 N. J. L. 173.

The pamphlet here in question is of a different nature, containing, as it does, the views of a number of citizens as to the management or alleged mismanagement of municipal affairs, a matter in which they, as well as other citizens, are vitally concerned." (Italics ours.)

Thus this Court chose, as exemplifying the scrupulous protection of freedom of the press, a decision which distinguishes sharply between commercial advertisements on the one hand and non-commercial matter on the other.

Finally, this Court has three times indicated that its recent handbill decisions are not to be taken as holding

that every written or spoken word is protected by the Bill of Rights. In *Thornhill v. Alabama* (ante, p. 15), this Court said (310 U. S., at p. 102):

"In the circumstances of our times the dissemination of information concerning facts of a labor dispute must be regarded as *within that area of free discussion that is guaranteed by the Constitution.*" (Italics ours.)

Similarly, in *Minersville School District v. Gobitis*, 310 U. S. 586 (1940), the Court stated (p. 599n):

"In cases like . . . *Lovell v. Griffin* 303 U. S. 444, *Hague v. C. I. O.*, 307 U. S. 498 and *Schneider v. State*, 308 U. S. 147, the Court was concerned with restrictions cutting off appropriate means through which, in a free society, *the process of popular rule may effectively function.*" (Italics ours.)

And see *Cox v. New Hampshire*, 312 U. S. 569, 577-578 (1941).

4. **A municipal regulation prohibiting the street distribution of commercial advertising is a valid exercise of the police power and entails no deprivation of property without due process.**

The widespread existence of ordinances prohibiting or regulating the street distribution of handbills sufficiently attests to the fact that the unfettered street distribution of handbills is a serious municipal problem. It is a matter of common knowledge, of which the Court have uniformly taken judicial notice, that most handbills which are passed out on the streets are soon cast away; that they then become a grave traffic hazard; that they constitute a hazard to health by the consequent clogging of gutters and

sewers; that for the same reason they constitute a flood hazard; that they constitute a fire hazard, and that they inevitably result in an additional burden upon the municipal budget if only because of the necessity of clearing them from the streets. Taking judicial notice of these matters, the Courts agree that it lies within the municipality's police powers to prohibit the distribution of commercial advertising matter. *People v. Horowitz*, 27 N. Y. Cr. R. 237, 140 N. Y. Supp. 437 (1912); *Allen v. McGovern*, 12 N. J. Misc. 12, 169 Atl. 345 (1933); *People v. St. John*, 108 Cal. App. 779, 288 Pac. 53 (1930); *Philadelphia v. Brabender*, 201 Pa. 574, 51 Atl. 374 (1902); *In re Anderson*, 69 Neb. 686, 96 N. W. 149 (1903); *Wettengel v. City of Denver*, 20 Colo. 552, 39 Pac. 343 (1895); *Sieroty v. City of Huntington Park*, 111 Cal. App. 377, 295 Pac. 564 (1931).

In upholding an ordinance prohibiting distribution of advertising circulars, the Indiana Supreme Court held directly that a commercial advertiser "has no property right in the privilege of distributing handbills and advertising matter". *Goldblatt Bros. Corporation v. City of East Chicago*, 211 Ind. 621, 627, 6 N.E. (2d) 331 (1937). And in holding valid an ordinance prohibiting sales of any articles except newspapers on the streets in certain congested districts, the Court, in *Chicago v. Rhine*, 363 Ill. 619, 2 N.E. (2d) 905 (1936), said (pp. 624-625):

"He [the defendant] is seeking to carry out his private commercial enterprise for his own personal financial profit on the streets within the loop district, one of the forbidden domains. Although he may have, prior to the passage of the ordinance, pursued his calling on the streets, his use thereof was solely a permissive one. He had no inherent right to operate his business in or upon the streets of the city. . . ."

The defendant had no property right in the use of any of the streets of Chicago for the location and maintenance of his business. He was therefore not deprived of liberty and property without due process of law; nor did the ordinance deprive him of any equality of right, contrary to the Fourteenth Amendment of the United States Constitution * * *."

That the prohibition of the distribution of commercial advertising constitutes a proper exercise of the police power and does not entail the deprivation of property without due process is sustained in an exhaustive opinion in *San Francisco Shopping News Co. v. City of South San Francisco*, 69 F. (2d) 879 (C. C. A. 9th, 1934), cert. den. 293 U. S. 606 (1934). And, as this Court has said in *Fifth Avenue Coach Company v. City of New York*, *supra*, 221 U. S. at p. 483, "If the ordinance was a proper exercise of the police power, plaintiff was not deprived of his property without due process of law".

Admittedly, non-commercial handbills are perhaps as obnoxious in respect of littering the streets as are commercial handbills. However, given the constitutional guarantee of freedom of the press, the hardships resulting from their distribution must be endured. This Court made this clear in *Schneider v. State*, *supra*, where it was said (308 U. S., at p. 163):

"As we have pointed out, the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution."

But, as we have demonstrated above, such is not the case with commercial handbills. Falling outside of the area of the Constitution's protection of free communication, a municipality is free to adopt such reasonable methods as it sees fit to remedy the evils to which their street distribution

gives rise. What those methods shall be is for the sole determination of the Legislature; it is outside the power of the Courts to decide whether some other or better means of meeting the evils might have been chosen. The question of "reasonableness" is for the Court only as it bears upon the constitutionality of the enactment. *In re Anderson, supra*, 69 Nev. 686, 688, 96 N. W. 149; *San Francisco Shopping News Co. v. City of South San Francisco, supra*, 69 F. (2d) 879, 885-890, cert. den. 293 U. S. 606; *Watters v. Indianapolis*, 191 Ind. 671, 673-674, 134 N.E. 482 (1922). In *Williams v. Mayor of Baltimore*, 289 U. S. 36 (1933), Mr. Justice CARDOZO said (p. 42):

"It is not the function of a court to determine whether the public policy that finds expression in legislation of this order is well or ill conceived.
 * * * The judicial function is exhausted with the discovery that the relation between means and ends is not wholly vain and fanciful, an illusory pretense."

The City of New York has seen fit to solve this problem by prohibiting the distribution of commercial advertisements on the streets of the City. We submit that the choice was one for the City, and since the remedy is a reasonable one, it is a proper exercise of the police power.

It is clear that a city need not allow its residents to conduct their private businesses on its streets. Thus, a city may outlaw pushcarts and peddlers; it may prohibit advertising signs which overhang the streets; it may outlaw advertising signs on buses and trucks which traverse the streets; and it may keep showcases from its sidewalks. What, then, is so sacrosanct about an advertising handbill that it may not be kept from the streets?

The majority of the Circuit Court of Appeals state that a municipality may only regulate, but may not prohibit, the

street distribution of commercial advertisements (R., 27, 28, 31-32). Among other things it is suggested that a city might prohibit the *casting away* of such advertisements by recipients rather than their *distribution* by advertisers (R. 32). To suggestions such as these there are three answers.

In the first place, it is perfectly obvious that the power to regulate commercial advertising must include the power to prohibit its distribution on the public streets. *The Lottery Case*, 188 U. S. 321, 355 (1903); *United States v. Hill*, 248 U. S. 420, 425 (1919); *Director General of Railroads v. Viscose Company*, 254 U. S. 498, 503 (1921); *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 334, 346-347 (1937). In the second place, it cannot be denied that the only effective and practical way of preventing littering is a prohibition against the distribution of handbills, and not through enactments against casting handbills away after they are distributed. For, while a single individual is responsible for causing the distribution of the handbills advertising a particular business enterprise, those who receive the handbills and cast them away after distribution can be counted only by the hundreds or the thousands.

Nor is the Court's suggestion (R., 27, 28, 32) of a "time and place" regulation of the distribution of such handbills a practical one. While regulations of "time and place" are effective with respect to parades, street speakers and assemblies, they fall short when applied to distribution of handbills, which will be cast away no matter when or where they are distributed.*

But the decisive answer to these suggestions is that the choice of remedies to be adopted lies with the Legislature and not with the Courts. Therefore, to deny the City the power to remedy a patent evil by the only effective means of doing so is not only to exalt the business interests of

the few above the welfare of the many, but is to substitute the judgment of the Courts for that of the legislature—doctrines unqualifiedly repudiated by this Court. Most appropriate are the statements of Mr. Justice HUGHES in *Purity Extract Company v. Lynch*, 226 U. S. 192 (1912), where he said (pp. 201-202):

"It is also well established that when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. *Booth v. Illinois*, 184 U. S. 425; *Olis v. Parker*, 187 U. S. 606; *Ah Sin v. Wittman*, 198 U. S. 500, 504; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31; *Murphy v. California*, 225 U. S. 623. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system."

5. A municipal regulation prohibiting the distribution of commercial advertising on the public streets entails no denial of the equal protection of the laws.

Both the District Judge (Appendix, *post*, pp. 47-48) and the majority of the Circuit Court of Appeals (see comment on their opinion in Judge FRANK's dissent, R., 49) were of the opinion that the regulation, § 318 of the Sanitary Code,

is discriminatory against the business man; that is to say, that it constitutes a denial of the equal protection of the laws. This position, however, is scarcely tenable.

The distinction between commercial advertisements and opinion or protest literature is not arbitrary or capricious; it is dictated by Federal and State constitutional guarantees of freedom of the press. *Matson Navigation Co. v. State Board*, 297 U. S. 441, 446 (1936); *Packer Corporation v. Utah*, *supra*, 285 U. S. 105, 109; *J. E. Railey & Bros. v. Richardson*, 264 U. S. 157, 160 (1924). The power in the City to enact the regulation implies the power "to classify the objects of legislation" and to make distinctions which have "a proper relation to the ordinance". *Fifth Avenue Coach Company v. City of New York*, *supra*, 221 U. S. 467, 484. See also, *Packer Corporation v. Utah*, *supra*, 285 U. S. 105, 108-111; *San Francisco Shopping News Co. v. City of South San Francisco*, *supra*, 69 F. (2d) 879, 887-889, 892; *Sieroff v. Huntington Park*, *supra*, 111 Cal. App. 377, 295 Pae. 564. The distinction between commercial and non-commercial handbills having been recognized by the Courts, a similar recognition by a local regulation cannot constitute a denial of the equal protection of the laws.

It follows that a prohibitory ordinance or regulation which is so drawn as to be limited to commercial advertisements alone is not open to objection on constitutional grounds. Here is but another instance in which an individual's claim of deprivation of property without due process of law and of denial of equal protection of the laws must yield to the rights of the public to have its health, safety and welfare protected through the exercise of the police power.

POINT II.

Section 318 of the Sanitary Code prohibits only the distribution of commercial and business advertising matter, and is therefore constitutional.

Section 318 of the Sanitary Code has been precisely and carefully phrased; it is a regulation "narrowly drawn" to prevent a definite and specific evil. *Cantwell v. Connecticut*, 310 U. S. 296, 307, 311 (1940). The regulation—by its express terms—applies only to commercial advertising matter.* Its last sentence provides as follows:

"This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

This is language that is plainly and easily understood. Moreover, even before this sentence was added in 1938 the New York Courts had made it plain that § 318 was intended to apply to advertising matter only. As applied to commercial advertising, its validity was expressly sustained in *People v. Horowitz, supra*, 27 N. Y. Cr. R. 237, 140 N. Y. Supp. 437. In 1921, it was held that § 318 in its then form

* Exhaustive research has turned up no State decisions invalidating a prohibition of commercial advertisements under ordinances so drawn as to apply only to advertisements of such a nature. Cases have been found in which ordinances were held invalid, even as to commercial advertisements, for the reason that they were so broadly or indefinitely drawn as to be capable of application to protest or opinion literature. See Lindsay, *Council and Court: The Handbill Ordinances, 1889-1939*, 39 Mich. L. Rev. 561 (1941). We recognize the soundness of those decisions. Their irrelevance to the case at bar is demonstrated by the discussion of § 318 of the Sanitary Code which is contained in this Point.

was "never intended to prevent the lawful distribution of anything other than commercial and business advertising matter", and that it did not apply to the distribution of anti-Ku Klux Klan leaflets. *People v. Johnson*, 117 Misc. 133, 134-135 (Gen. Sess., N. Y. Co., 1921). Of especial pertinence is the more recent holding that notices and advertisements of a Communist mass meeting are not commercial advertisements within the scope of § 318 and could be freely distributed on the streets, even though the handbills set forth a price of admission to the meeting. *People v. Loring and Green* (Mag. Ct., N. Y. Co. 1933, unreported but noted in 1 I. J. A. Bull., No. 12, p. 2).

As a result of the *Johnson* and *Loring* cases, § 318 and its predecessors were recognized long before 1938 to apply only to commercial advertising in the very sense in which we use that term. In short, the addition in 1938 of the saving clause quoted above (*ante*, p. 27) neither added anything to nor detracted anything from the operation and effect of the regulation. Indeed, the addition of the clause was a mere enactment of the law as it already stood by force of well established judicial construction.

It will be noted that these New York decisions are in full accord with the *Lovell*, *Hague* and *Schneider* cases. Significantly enough, in a case in the New York Courts which arose after this Court had decided those three cases, the precise views expressed in this brief were adopted in a situation which presented the question of whether the street distribution of a department store advertisement could be prohibited under § 318. *People v. LaRollo*, 24 N. Y. Supp. (2d) 350 (Mag. Ct., N. Y. Co., 1940). The Court there held that § 318 was clearly constitutional as applied to such an

advertisement.* The essence of the Court's opinion is contained in the following quotation (p. 354):

"The considerations which justify and require that the public interest in the cleanliness of its streets be made subordinate to the more important rights of its citizens freely to proclaim their ideas and principles, are not equally applicable where the individual distributor seeks merely to advertise and solicit patronage for his purely commercial enterprise."

The cited decisions of the New York Courts show that, in holding that the distribution of *non-commercial* literature could not be restrained under § 318, have consistently done so upon the ground that § 318 *was never intended to apply to such literature*. We therefore submit, first, that the purpose and scope of § 318 are not open to dispute; and, second, that § 318 is not so broad and all-embracing in its provisions and application as to be subject to condemnation upon the ground that it applies to literature of the kind which comes within the protection of the Constitution.

POINT III.

A valid prohibition against the street distribution of commercial advertising may not be evaded by the device of adding to a purely commercial handbill a gratuitous protest against the acts of public officials such as that involved in this case.

(1)

We come now to the question of whether handbill A (Pltf. Exh. A; R., 18A-18B) constitutes "commercial and

* This decision (which was not appealed) accords with the almost unanimous predictions of the law review writers. See, *e. g.*, 35 Ill. L. Rev. 90, 93-95 (1940); 24 Minn. L. Rev. 570 (1940); 12 So. Cal. L. Rev. 466, 468 (1939).

business advertising matter" within the meaning of § 318 of the Sanitary Code. As we have pointed out above, the District Court, though originally of the opinion that § 318 is unconstitutional and invalid on its face, in the final decree found only that the regulation is invalid as applied to handbill A (*ante*, p. 8); the majority of the Circuit Court of Appeals has held that handbill A is not a commercial handbill, that it is not "a mere subterfuge", and that § 318 cannot constitutionally be extended to it (*ante*, pp. 8-9).

Judge FRANK has reached precisely the opposite conclusion (*ante*, pp. 9-10). He opens his dissenting opinion as follows (R., 32):

"To my mind, the majority opinion has reached the wrong conclusion primarily because it erroneously deals with this case as if it involved the attempted distribution of a single handbill of non-commercial or 'free speech' character, which contains some related and incidental commercial or business advertising. On that fallacious assumption of fact, the majority holds that the City ordinance, here before us, is unconstitutional in so far as it prohibits the distribution on City streets of such a non-commercial handbill. . . . I shall try to show the error of the majority's factual premise, since, if that fails, the principal ground of its decision vanishes."

He then goes on to demonstrate why handbill A is merely a commercial handbill (R., 32-42). His demonstration proceeds as follows:

Chrestensen had two distinct disputes with City officials. The first dispute arose when he sought to obtain a City pier at which to exhibit his submarine for profit, and the Dock Commissioner refused; this resulted in his obtaining a state-owned pier. The second dispute arose when he asked the police for permission to distribute handbill No. 1 (R., 18C)—concededly a commercial handbill—on the City

streets, and the Police Commissioner denied this request because of § 318 of the Sanitary Code (R., 32-33).

Chrestensen then prepared handbill A (R., 18A-18B). The face of this handbill is the revision of handbill No. 1, stipulated on Chrestensen's behalf as consisting of commercial and advertising matter and containing no expression of opinion. The reverse side of the handbill consists only of a protest against the Dock Commissioner's refusal to allow Chrestensen a City pier for exhibition of his submarine (R., 33).

There was thus no inherent relation between the matter on the face of the handbill and the matter on the reverse side. The matter on the reverse side was an expression of opinion the distribution of which could not constitutionally be prevented; indeed, § 318 excepts it from its provisions, and the police expressly told Chrestensen he could freely distribute it separately. There was no reason why he could not do so; the two sides of the circular are unrelated in subject matter and could be divided without injury to either; they are separable and independent. The issue thus is narrowed to whether the separable matter on the face of the handbill is wholly commercial (R., 33-34).

That it is wholly commercial is manifest. Chrestensen's purpose or motive in proposing to distribute his original handbill, handbill No. 1,—for which he subsequently substituted handbill A—is admittedly wholly commercial. Pursuant to the presumption that, at least for a short time, a man's purpose or motive continues the same, Chrestensen's motive or purpose, when he substituted the revision for the original handbill, must be presumed to have continued the same. *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 559 (1930). That the protest matter gratuitously printed on the reverse side of the handbill had a quite dif-

ferent motive or purpose, does not overcome that presumption (R., 34-35).

There is no other evidence to overcome the presumption; on the contrary, the record reinforces it. There was no trial, and it must be assumed that had there been one, the statements contained in the stipulation of facts (R., 15-18) would have been conclusively proved and then found by the Court. These would have included findings as set forth in the stipulation of facts that the face of handbill A contains commercial and business advertising matter which solicits the public's patronage; that the reverse side contains, not advertising matter, but rather a public protest; that the police advised Chrestensen that the protest matter on the reverse side of the handbill could be freely distributed if separated from the matter on its face; that Chrestensen did not attempt to distribute the protest matter disassociated from the commercial-advertising matter, and that the restraints of the police on the distribution have and will result in a diminution of the number of persons paying admission fees so as to reduce Chrestensen's net profits by an amount in excess of \$3,000. These facts leave no room for doubt that handbill A consists of a purely commercial handbill on its face and a separable "free speech" handbill on its reverse side (R., 35-36).

The record so made stands exactly as if Chrestensen had taken the witness stand and testified, without equivocation, that his intention with respect to the face of the handbill was wholly commercial as contrasted with his intention with regard to the matter on the reverse side, which was non-commercial. Moreover, the Court may take judicial notice of the motives which commonly operate upon human conduct in ascertaining Chrestensen's purpose—and the dominant purpose of business men "is to seek customers and make profits". Since Chrestensen is a business man, the

Court is "justified in concluding that, as his sole purpose in connection with the original handbill was unquestionably commercial, his purpose in trying to distribute the handbill found on the face of Exhibit [handbill] A was the same". His business is that of exhibiting his submarine for profit; the public was to be charged admission and that is why he wanted members of the public to appear; he does not exhibit his submarine for educational or propaganda purposes. Why, then, should the Court refuse to recognize that handbill A was commercial? (R., 37-38).

Decision in the instant case, says Judge FRANK, should not be impeded by the consideration that cases may arise in the future which present "some difficulty in ascertaining the primary purpose in distributing a handbill" and in drawing a line of demarcation between commercial and non-commercial matter (R., 39).

After pointing out there is no evidence of mixed motives as to the matter on the face of handbill A (R., 38), Judge FRANK concludes as follows (R., 40-41):

"And especially in the instant case there need be no judicial anguish in drawing a line, and no occasion for psychological probings of Chrestensen's mental interior in order to ascertain what he was after, when endeavoring to distribute the matter on the face of Exhibit A: His original purpose, the contents of his stipulation of facts, his complaint that the enforcement of the City's ordinance diminished the number of persons paying fees for admission so as to cause him a loss of profits in excess of \$3,000, are ample objective indicia of a commercial purpose with reference to the separable handbill printed on the front of Exhibit A."

We respectfully submit that this analysis of the stipulated facts is irrefutable. The conclusion is inescapable that Chrestensen's sole object in adding the protest material to

the back of his advertisement was to get around the prohibition of § 318, and thus to shift the cost of advertising his exhibition from his own pocket to that of the taxpayers, by compelling them at the very least to bear the expense of cleaning up the litter with which his activities would cover the city streets.

(2)

The majority of the Circuit Court of Appeals disagreed in principle with our view that the Courts should inquire into the circumstances surrounding the origin and purpose of hybrid handbills such as that involved here, and upon that basis determine whether they are or are not commercial in character. To do so, said Judge CLARK, would lead to "uncertainty, not to speak of unreality" (R., 30), and would necessitate the drawing of a line where none clearly appears.* For, he asks, "How much is 'primarily'?" and "... if intent and purpose must be measured, how can we say that plaintiff's [Chrestensen's] motives are only or primarily financial?" (R., 30, 31).

To this position there are two answers. In the first place, as Judge FRANK pointed out (R., 39), the making of such determinations and the drawing of such lines is inherent in the nature of the judicial process. Mr. Justice

* We know of only one other case involving a hybrid handbill, *People v. Taylor*, *supra*, 33 Cal. App. (2d) 760, 85 Pac. (2d) 978. The handbill there involved was a four-page mimeograph published by the San Diego Communist Party Election Campaign Committee. It was almost wholly devoted to political discussion, but contained an advertisement of a non-profit bookstore selling books on related economic and political subjects. The handbill was thus clearly non-commercial in character, and its sole purpose, both in its text and through the advertisement, was to disseminate certain opinions or propaganda on matters of public concern. The Court had no difficulty in holding that the distribution of such a handbill was protected by the right of freedom of the press.

HOLMES frequently stated that where to draw such lines "is the question in pretty much everything worth arguing in the law". *Irwin v. Gavit*, 268 U. S. 161, 168 (1925); see also CARDOZO, *The Nature of the Judicial Process* (1921), p. 46; *The Paradoxes of Legal Science* (1928), p. 62. Judge CLARK might just as well criticize the legal concepts of "negligence", the "reasonable man", "restraint of trade" and many others deeply rooted in our jurisprudence. Courts of necessity are confronted with the problem of exploring the shadowy penumbra which lies between light and darkness. In the second place, in marking out the limits of the area protected by the guarantees of freedom of speech and of the press, this Court has often been required to draw lines of distinction in degree and quality. This was very recently the subject of opinion in *Bridges v. California*, 314 U. S. —, 62 Sup. Ct. 190 (1941). There, after stating that this Court had set up the "likelihood of bringing about the substantive evil" * as the test of constitutionality, Mr. Justice BLACK said, "How much 'likelihood' is another question, 'a question of proximity and degree' that cannot be completely captured in a formula" (62 Sup. Ct., at p. 193; italics ours). He further said that although under the "clear and present danger" † test, this Court has not yet fixed the standard for determining when a danger is clear or present, this language has nevertheless afforded "practical guidance" in a great variety of cases in which the scope of freedom of expression was in issue (*ibid.*). Obviously, a test that "cannot be completely captured in a formula", a working principle which affords only "practical guidance" in determining what is "extremely serious" with a "degree of imminence extremely high" call for the continuous drawing of lines in a field at least as difficult as

* *Gitlow v. New York*, 268 U. S. 652, 671 (1923).

† *Schenck v. United States*, 249 U. S. 47, 52 (1919).

determining what is "primarily financial" or what constitutes "commercial or business advertising matter". We therefore submit that Judge FRANK correctly concluded that handbill A is a commercial handbill.

Conclusion.

We submit that every consideration of policy requires a holding that a handbill such as this should not be given the same protection under the First and Fourteenth Amendments to the Constitution as is accorded to a protest or opinion handbill. The civil right of freedom of the press is a precious and valuable safeguard of our way of life. The Courts must accordingly be as vigilant to see that it is not abused, as they are to see that it is observed. Only thus will it be accorded the respect which is its due, and only thus will its usefulness and value, and perhaps even its very existence, be preserved.

The decision below has opened the way for the owner of every business enterprise in the country to flood the streets of our cities with commercial advertising under the guise of exercising the right of freedom of the press. Why should any business man spend large sums of money to purchase expensive advertising space in newspapers, in periodicals, or on billboards, when all he has to do is to add a protest against some act of a public official to his advertisement and hire a few people to distribute it to all corners on the busiest corners of the public streets? That this will create an administrative problem of the first magnitude for municipalities is bad enough. But what is worse, it will inevitably tend to decrease the regard in which our civil rights are held. For, to put it bluntly, Chrestensen has been permitted to exploit the Bill of Rights in order to saddle the cost of promoting his purely commercial enterprise upon the taxpayers of New York City. To permit such

exploitation is not to aid the cause of Civil Liberties. On the contrary, the public indignation which will arise should the streets of every city in the Union be littered with commercial advertising in the name of Civil Liberty will do far more harm to that cause than could possibly arise from a decision confining commercial advertisers to their traditional field of purchasing space on billboards or in the public press.

We therefore submit that the Court below erred on two counts on this branch of the case. First, in its interpretation of the facts, which led to the erroneous holding that handbill A is not "commercial and business advertising matter". Second, in its conception of policy, which led to the likewise erroneous holding that every effort should be made to hold that hybrid handbills such as this fall within the protection of the Constitutional guarantees. Both propositions merit the disapproval of this Court.

The decree of the Circuit Court of Appeals and of the District Court should be reversed, and the cause remanded with directions to dismiss the complaint upon the merits.

New York, N. Y., February 26, 1942.

Respectfully submitted,

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}
of Counsel.

APPENDIX.

**Opinion of District Court on Motion for Injunction
Pendente Lite, Aug. 26, 1940.**

(Reported: 34 F. Supp. 596).

HULBERT, District Judge.

Plaintiff moves for an order enjoining, pendente lite, the defendant and members of the Police Department of New York City, acting by and under the direction of the defendant, from interfering with the distribution by plaintiff, or his agents, servants and employees, of handbills in the streets and on the sidewalks in the City of New York, including streets and sidewalks contiguous to and within Battery Park in the Borough of Manhattan, City of New York and from interfering with "sandwich men" employed by plaintiff on sidewalks adjacent to said park.

Jurisdiction is claimed to exist because this is a civil action to redress the deprivation, under color of state law, ordinance and regulation, of rights, privileges and immunities secured by the Constitution of the United States, and of rights secured by laws of the United States providing for equal rights of citizens of the United States and of all persons within the jurisdiction of the United States; that the amount in controversy exceeds \$3,000, and that the suit arises under the Constitution and laws of the United States.

Plaintiff is a citizen of Florida, and the defendant is a citizen of New York.

Plaintiff owns and maintains for the purpose of exhibition to the public at a fixed admission fee, a former U. S. Navy submarine (S-49).

When he brought this vessel to New York he sought a berth for it at the City-Owned Battery wharf, from which

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most pleasure vessels, operated for profit in our harbor, embark and discharge passengers. His application having been denied in accordance with the established policy of the municipality, he then secured facilities at a State-Owned Barge Canal terminal, Pier 5 East River, claimed to be a much less desirable location, just above South Ferry.

In order to advise the public, attracted to the Battery by its accommodations for recreation and entertainment, and solicit patronage, plaintiff designed a circular or handbill which he intended to have distributed on the public thoroughfares and sidewalks in and adjacent to Battery Park, and submitted same to the New York City Police Department, and was informed that such practice would be a violation of the provisions of the New York Sanitary Code and the Health Department Rules relating specifically to parks.

Plaintiff then had printed on the reverse side of the circular or handbill, a protest against the action of the Dock Commissioner of the City of New York in refusing his application for docking facilities. The Police Commissioner has restrained its distribution.

The chief question presented for determination is whether the plaintiff's fundamental rights and liberties of freedom of speech and freedom of the press, protected by the First Amendment to the United States Constitution from infringement by Congress, and extended by the Fourteenth Amendment against invasion by State action, have been abridged.

It is conceded by the defendant that the distribution of a handbill, except on public park property, if confined to the criticism of the action of the Commissioner of Docks, would be permissible on the streets without police molest-

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tion. But, he contends, in combination with commercial advertising it loses its privileged status.

Section 318 of the Sanitary Code of the City of New York reads as follows: "No person shall throw, cast or distribute or cause or permit to be thrown, cast or distributed, any handbill, circular, card, booklet, placard or other advertising matter whatsoever, in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule or any hall of any building, or in a letterbox therein; provided that nothing herein contained shall be deemed to prohibit or otherwise regulate the delivery of any such matter by the United States postal service, or prohibit the distribution of sample copies of newspapers regularly sold by the copy or by annual subscription. This section is not intended to prevent the lawful distribution of anything other than commercial and business advertising matter."

Article II, Section 6, of the Park Regulations of the City of New York reads as follows: "No person shall post any bill, placard, notice or other paper upon any structure, tree, rock, article or thing within any park, or upon any park street, or paint or affix thereon, in any other way, any advertisement, notice or exhortation. No person shall distribute, hand out, deliver, place, cast about or leave about any bill, billboard, ticket, handbill, card, placard, circular, pamphlet or display any flag, banner, transparency, target, sign, placard or any matter for advertising purposes, or operate any musical instrument or drum within any park or upon any park street, or cause any noise to be made for advertising purposes or the purpose of attracting attention to any exhibition, performance, show or other purpose, within any park or upon any park street. The placing, or using for any other purpose than reading of newspapers, or

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other papers on the beaches or boardwalks, on the lawns or beaches of public parks is prohibited."

A public park has been defined by the New York Court of Appeals as "a piece of ground inclosed for purposes of pleasure, exercise, amusement or ornament." *Perrin v. N. Y. C. R. R. Co.*, 36 N. Y. 120.

The public visit their parks to enjoy the beauties of nature, to rest, and sometimes to put aside their cares, or if to meditate upon them, to do so in solitude. However, counsel for the plaintiff has not pressed convincingly his application so far as the regulation pertaining to the Battery Park is concerned, and I find it to be without merit and dismiss it from further consideration.

Ordinarily the constitutionality of statutes is reserved to the appellate courts, and when the trial court undertakes to pass upon the question it must be satisfied of the unconstitutionality of the Act beyond a reasonable doubt before so deciding.

The United States Supreme Court in *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 667, 82 L. Ed. 949, held unconstitutional an ordinance of the City of Griffin, Georgia, which provided:

"Section 1. That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the City Manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.

"Section 2. The Chief of Police of the City of Griffin and the police force of the City of Griffin are hereby re-

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quired and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

In delivering the opinion of the court, Mr. Chief Justice Hughes said (page 451 of 303 U. S., page 668 of 58 S. Ct., 82 L. Ed. 949):

"The ordinance is not limited to 'literature' that is obscene or offensive to public morals or that advocates unlawful conduct. There is no suggestion that the pamphlet and magazine distributed in the instant case were of that character. The ordinance embraces 'literature' in the widest sense.

"The ordinance is comprehensive with respect to the method of distribution. It covers every sort of circulation 'either by hand or otherwise.' There is thus no restriction in its application with respect to time or place. It is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets. The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager.

"We think that the ordinance is invalid on its face."

Subsequently state courts in four different states upheld ordinances which prohibited the distribution of handbills, or of house-to-house solicitation, each attempting to distinguish the Lovell case, *supra*; in *City of Milwaukee v. Snyder*, 230 Wis. 131, 283 N.W. 301, upon the ground that the ordinance was aimed at preventing the littering of the streets; in *Com. of Massachusetts v. Nicols*, 301 Mass. 584,

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18 N. E. 2d 166, because the ordinance applied to only a part of the City of Worcester in State (Town of Irvington, N. J.) v. Schneider, 121 N. J. L. 542, 3 A. 2d 609, because the ordinance was aimed at canvassing or soliciting; and in People of California v. Kim Young, 33 Cal. App. 2d Supp. 747, 85 P. 2d 231, because the ordinance did not prohibit distribution of what the court characterized as "commercial advertising" in all parts of the City of Los Angeles.

All four of those cases were reversed and each ordinance held unconstitutional by the United States Supreme Court. *Schneider v. State (Town of Irvington)*, 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155.

No distinction was made in any of these cases between commercial and non-commercial circulars or handbills.

The defendant urges that Section 318 of the Sanitary Code is enforced against "commercial" handbills to avoid littering of the streets.

It is less likely that the distribution of non-commercial handbills will not result in littering the streets?

It is said in 5 University Chicago Law Review 675, 676 (1938): "The value of such a distinction is open to doubt. What is news of general nature as compared with advertising matter? Is the announcement of a political meeting matter of general nature? A New Jersey court [*Almassi v. City of Newark*, 150 A. 217, 8 N. J. Misc. 420] held it was advertising matter only. In a recent Massachusetts decision [*Commonwealth v. Kimball*, 299 Mass. 353, 13 N. E. 2d 18, 114 A. L. R. 1440] pamphlets advocating a labor union were held advertising matter. On the other hand, a Michigan court [*People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578] held that an ordinance was not reasonable if it included in its prohibition

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the circulating of 'an invitation to a moral and Christian assembly of people gathered together for the public good.' "

In the final disposition of the four cases above referred to, Mr. Justice Roberts, writing for the court said, (308 U. S. page 162 60 S. Ct. page 151, 84 L. Ed. 155): "The motive of the legislation under attack [the Los Angeles, Milwaukee, and the Worcester ordinances] is held by the courts below to be the prevention of littering of the streets and, although the alleged offenders were not charged with themselves scattering paper in the streets, their convictions were sustained upon the theory that distribution by them encouraged or resulted in such littering. We are of opinion that the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets, as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press. This constitutional protection does not deprive a city of all power to prevent street littering. There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets."

A city ordinance of the suggested character (merely prohibiting the casting of handbills into the street) has been upheld as reasonable and valid in *City of Philadelphia v. Brabender*, 201 Pa. 574, 51 A. 374, 58 A. L. R. 220.

People v. Taylor, 33 Cal. App. 2d Supp. 760, 85 P. 2d 978, 979, decided December 31, 1938, is quite in point with the case at bar: The defendants were charged with a violation of Ordinance 10731 of the City of San Diego and after

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pleas of not guilty but before trial the case was dismissed and the people appealed. Haines, Presiding Judge, said:

"We think that the judgment must be sustained. Though the case was not tried upon the facts there is in the record what the parties stipulate is a copy of the matter circulated. It is a mimeographed publication of a radical but not incendiary nature; mainly devoted to political discussion but containing certain advertising matter."

. . .

"We do not question the right of the Council to inhibit the defacing of property by affixing to it posters, circulars or notices, nor do we question the council's right to forbid the depositing upon sidewalks, streets or other public places, or for that matter the unauthorized depositing on private property of dodgers, notices, circulars or other matter having a tendency to create an accumulation of rubbish. Such inhibitions are manifestly proper uses of the police power and have often been so held. [Citing Cases.] It is true that a portion of the San Diego ordinance under review is directed against that evil. This, however, is not the portion of the San Diego ordinance under which the charge before us is laid. What is charged is a mere personal distribution of advertising matter to pedestrians on a public street and to persons in another public place."

"There is no charge that such matter was forced upon persons not willing to receive the same or that there was anything in the distribution tending to disturb the peace or public order or to cause any littering of the streets or of any public place. The attempt to prohibit the mere handing of advertising matter to persons on the streets or in other public places has often been held to be an unlawful and unwarranted invasion of private rights and therefore

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to be beyond any legitimate exercise of the police power, and we are in accord with that view. [Citing Cases.]”

Indeed, cases in our own state have come into step with the more modern trend of constitutional interpretation since 1938. *People on Complaint of Mullaly v. Banks*, City Magistrates Court of New York, Borough of Manhattan, First District, July 20, 1938, 168 Misc. 515, 6 N. Y. S. 2d 41; *People ex rel. Gordon v. McDermott*, Supreme Court, Albany County, 169 Misc. 743, 9 N. Y. S. 2d 795. Compare *People v. Armstrong*, 73 Mich. 288, 41 N. W. 275, 2 L. R. A. 721, 16 Am. St. Rep. 578; *City of Chicago v. Schultz*, 341 Ill. 208, 173 N. E. 276; *Ex parte Pierce*, 127 Tex. Cr. R. 35, 75 S. W. 2d 264.

It is argued on behalf of defendant that the plaintiff has sought to manufacture a case which, under the cloak of civil liberty, would “permit him to line his own pockets through the medium of unlawful advertising at the expense of the people of the City of New York,” and it is urged that by reason of the absence of a deprivation of civil right this Court is without jurisdiction under Section 24 (14) of the Judicial Code, Section 41 (14), Title 28 U. S. C., 28 U. S. C. A. § 41 (14).

The plaintiff claims loss of profits because he has been compelled to berth his vessel at a less favorable location. He may show the location to be less favorable, but it cannot be assumed that the Dock Commissioner acted from improper motives when he carried out an administrative policy. However, the plaintiff has been deprived of a civil right in distributing an informative circular concerning the location of his exhibit and soliciting patronage. The ordinance is clearly discriminatory against the business man while affording protection to persons, distributing non-com-

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mercial handbills, whose convictions and efforts might be subversive to the welfare of the government.

I hold Section 318 of the Sanitary Code of the City of New York to be invalid.

With respect to the "sandwich men", employees of the plaintiff, there has been a determination against the police commissioner in the case of *Walters v. Valentine*, 172 Misc. 264, 12 N. Y. S. 2d 612, in the Supreme Court, New York County, Special Term, Part I, McCook, J., April 26, 1939.

Motion granted to extent thus indicated. Settle order on notice.